LOS ANGELES BAR BULLETIN

In This Issue

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LOS ANGELES
BAR BULLETIN

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WE MUST INFORM OURSELVES

MANY of us sincerely believed, when we were released from military service some 25 years ago, that the last major war had been fought. Now, according to the newspapers, the British are beginning to think that the threat of 5-ton robot bombs is not entirely German propaganda. Many of us have firsthand information about weapons being built or planned that will be far more deadly than any weapon ever used. It is not hard to believe that a third world war might result in the virtual annihilation of mankind.

If one of our clients faces a known peril, we inform ourselves about the peril and work at some means of preventing it. With the continued existence of mankind in peril, we seem to remain inactive. How many of us have any specific knowledge of any plan for preventing recurrence of a world war—knowledge specific enough to enable us to explain the plan to a neighbor? How many of us read (not skimmed in five minutes, but read) the treatise "The International Law of the Future" published by the American Bar Association? How many of us read what was written by E. D. M. about the treatise in the June, 1944, number of the BULLETIN? For years we have been saying, and justifiably, that the legal profession always has and always will take the lead; that we

shall meet the challenge of the future; that we are ready and capable for leadership; *et cetera.*

If we intend to assert our claim to leadership in the field that concerns all of us and everybody, then we must do at least the bare minimum of informing ourselves.

—E. W. T.

A WORD FROM THE PRESIDENT

THE ASSOCIATION will, as usual, discontinue monthly luncheon meetings during July and August, and will resume regular meetings September 19th.

The committees of the Association are doing a splendid job. The work of some of the committees has received national recognition. The most recently appointed special committee, under the chairmanship of Norman Sterry, was appointed at the request of the chairman of Committee on Revision of the Laws of the House of Representatives to suggest to and advise with the Congressional committee in its study of the Judicial Code and laws relating to the federal judiciary.

If anyone questions the necessity for, and great value of, the organized bar, let him analyze the list of committees of the Association and the work assigned to each committee as printed in the last BULLETIN. It is obvious that only through a well organized bar can such work be done. The importance of the work assigned to the committees of the Association can not be gainsaid.

It is reassuring, indeed, to observe the increasing interest in, and the willingness to undertake, Association activities on the part of the able and prominent members of our bar. The very important fields of international law, administrative law, and both the adjective and substantive statutory law of our state await courageous, constructive, and informed leadership which the bar is capable of rendering. Other important matters relating to government and the public good require the specialized training of members of the bar. The bar must and will heed these calls to service.

Harry J McClean

"INDICES TO PROBABILITY"—Editor's Note

Indices to Probability by Judge William J. Palmer is reviewed in this number of the BULLETIN in an article written by Lester Wm. Roth. Probably nothing could be added to Mr. Roth's work except a description of the book itself.

The book contains 188 pages of text and 15 pages of tables and index. It was published by West Publishing Co., of St. Paul, and sells for $4.00.

The book does not look like a law book. It is attractively bound in brown imitation leather. The chapter titles do not resemble law book titles (for example, "Modern Design," "Mind," "Oddments and Endments"); but you will find that in the chapters themselves the author has presented a clear statement of his views of the place of presumptions in our legal system.

—E. W. T.

JOINT MEETINGS WITH LOS ANGELES COUNTY MEDICAL ASSOCIATION

THE board of trustees recently authorized the president to appoint a committee to arrange a series of lectures to be given jointly by our association and Los Angeles County Medical Association. The president designated the following persons to serve on the committee: John P. McGinley, Elber H. Tilson, and F. Murray Keslar, chairman.

Mr. Keslar has reported that the medical association has appointed a committee consisting of Fred B. Clarke, M. D., John Severy Hibben, M. D., and Louis J. Regan, M. D.; that arrangements have been made for a series of meetings to be held this fall.

Mr. Keslar's report reads in part as follows: "Many problems arise in a case in which the attorney finds it necessary to utilize the services of a physician in the preparation and trial of his lawsuit. This series of programs is designed to acquaint the attorney with the problems of the doctor, to give to the attorney a better understanding of the medical problems involved in a case, and to acquaint the attorney with the vocabulary of the doctor. The committee believes that a series of programs of this type will bring about a closer understanding between the two professions."

A complete schedule of the meetings will be published in a later number of the BULLETIN.

ON THE FIGHTING FRONT

Since this column last was published (March, 1944), the following names have been added to the list of members who are in the armed services:

Ayers, Alvin James, USNR
Duni, Rollin F., Pvt. USA
Olstyn, Edward, Lt. (j.g.) USNR
Hall, Gordon, Jr., S 1/c USNR
Kimbrough, A. R., Lt. (j.g.) USNR

A LAWYER'S PLACE IN THE FIELD OF PENSION AND PROFIT-SHARING PLANS

By Richard H. Forster, of the Los Angeles Bar and Lecturer in Taxation, School of Law, University of Southern California

THIS is not intended as a technical discussion of pension and profit-sharing plans.[1] It is addressed to those lawyers in general practice who are faced with the problem of what to do when clients seek their advice relative to the adoption of such plans. It is an attempt to point out to these lawyers the importance to their clients of having their counsel and advice. In these days of criticism by attorneys of the usurpation of their function by persons practicing before administrative agencies, there is a tendency to lose sight of the fact that in fields such as this

[1]As an aid to lawyers interested in source material in this field, reference is made to the following: Prentice-Hall now has a service on Pension & Profit-Sharing Plans which is an excellent compilation of the many Federal rules and regulations pertaining to the subject and the requirements and procedure necessary for qualification. A 92-page booklet distributed by Chase National Bank, entitled "Pension, Bonus and Profit-Sharing Plans" is, in my opinion, the most understandable and complete discussion yet available of the factors to be considered in adopting plans. Many of the Los Angeles Trust companies have done extensive work in the field and are in a position to render valuable and instructive help. Numerous articles have appeared in *Trusts & Estates, Taxes, The Tax Magazine, New York Journal of Commerce, Journal of Accountancy and The Controller.* Lists of titles of many of these articles appear in the October, 1943, issue of *Taxes, The Tax Magazine,* and in the August, 1943, issue of *Trusts & Estates.* The June, 1944, issue of *Trusts & Estates* contains several excellent articles. The *New York Journal of Commerce* has recently published a collection of articles entitled "Practical Pension Planning," covering every phase of the subject. Caution must be used in following suggestions in some of the earlier articles, since many changes in policy and interpretation have been and are being made currently by the Pension Trust Group of the Bureau of Internal Revenue. There has now been established in Los Angeles a representative of this Group, Mr. Lambert Henderson, Internal Revenue Agent, whose function it is to discuss technical problems with employer's representatives and who is charged with the responsibility of recommending to the Washington office the passage of proposed plans.

one no one does or can render as able service to a company as its general counsel.

There is a constant increase in the pressure on employers to adopt some sort of employees' benefit plan.[2] As the number of companies adopting such plans increases, the pressure increases on other companies to take some action.[3] The present tax advantages[4] afforded taxpayers adopting such plans lead employers to conclude that if they are ultimately going to put a plan into force, now is the time to take the step. The result is that many a lawyer who has considered this field as a highly specialized one in which he has, and will continue to have, no more than a pass-

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[2]Employees' benefit plans as herein used fall into two main categories, pension plans and profit-sharing plans. As the names imply, a pension plan is designed primarily to afford benefits to employees at retirement while a profit-sharing plan contemplates a sharing of profits with the employees, although receipt by them may be deferred until retirement, death, disability, sickness, or termination of employment. The technical difference, according to Regulations 111, Sec. 29.23(4), is that under a pension plan the benefits at retirement can be actuarially determined, while under a profit-sharing plan the cost or contribution by the employer is indefinite and the benefits cannot be determined. In order to keep the contributions by the employer from being immediately available to the employees, and yet put the contributions beyond the control of the employer, a trustee or third party must be used. Very technical requirements have been set up by the provisions of sections 165a and 23(p) of the Internal Revenue Code, and the Commissioner's regulations thereunder, to enable the employer to secure a deduction for tax purposes of the amount contributed into such trusts, and yet prevent such amount from being taxable income to the employees in the year of contribution.

[3]It is impossible to measure accurately the number of plans being adopted currently in the Los Angeles area, but there are at least 150 in operation and well over 100 more now being considered for adoption.

[4]Contributions into qualified pension and profit-sharing plans are deductible by the employer and not currently taxable as income to the employees, except for the cost of life insurance benefits afforded by the plan. The employees pay income tax on the benefits when received at retirement, disability, termination of employment, *et cetera*. Internal Revenue Code, secs. 165(b) and 22(b)(2). Too much emphasis cannot be placed on the inadvisability of a company's adopting a pension or profit-sharing plan principally because of the tax advantages. Every qualified person interested in plans agrees on this point. If a plan is discontinued within a few years for other than business necessity, the tax deductions for the years when it was in operation will be disallowed. Regulations 111, sec. 29.165-1(a). In addition, the effect of discontinuance on employees' morale may be very harmful to the employer. Trust companies and insurance companies are now wisely requiring convincing evidence of the ability and intent of a company's maintaining a plan in effect before they will become a party to it. They realize that early discontinuance will be expensive to them in money as well as good will, both as to the employees and the employer.

ing interest, suddenly may be faced with a client seeking his advice as to the adoption of an employees' benefit plan.

Of all of the parties involved in the adoption of a pension or profit-sharing plan, the employer is often the least, if not the most poorly represented from a legal standpoint. If a corporate trustee is used, the attorneys for the trust company have as their responsibility and primary duty the protection of the trustee. If the plan is funded by the purchase of insurance or annuity contracts, the attorneys for the insurance company will protect their client.[5] Practically the sole aim of the Bureau of Internal Revenue in setting up its requirements for qualification of plans is the protection of the employees. The same is true of the Franchise Tax Commissioner, the Commissioner of Corporations and the Securities and Exchange Commission.

The trust company, the insurance company, and each of these governmental agencies are represented by attorneys who have acquired a special knowledge of the subject. The employer will receive technical assistance and advice from the attorneys for the trustee, insurance company, and the Bureau; but there is still

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[5]There are three principal methods of funding pension plans. Under one method, a trust is created and the trustee uses the funds to purchase individual life insurance and/or annuity contracts covering the individual employees, which afford the employees their benefits at death, retirement, termination of service, *et cetera*. Under a second method, a trust also is created, but the trustee accumulates the fund, invests it, and pays out directly to the employees their benefits at retirement, *et cetera*. The third method consists of a direct group annuity contract between the employer and an insurance company with no trustee involved, the insurance company paying out the benefits on retirement, *et cetera*. Many combinations of two or more of the above methods also have been used to answer specific requirements. As is generally true, the cost of the plan varies directly with the benefits to be derived. An individual policy plan, though bearing the highest cost, gives greater benefits at death, has more flexibility as to method of payment to employees, *et cetera*. Where relatively few employees are involved, it becomes necessary to adopt an individual policy plan. Group annuities very seldom are written covering less than 50 people, and the cost of administration of a non-insured trust becomes prohibitive when a small group participates (in addition to the increased chance of actual experience varying from the assumptions made by the actuaries). On the other hand, with large groups of employees, or coverage which does not eliminate employees among whom turnover is high, the cost of an individual policy plan becomes prohibitive. A good plan must be designed to fit the company. For instance, a competent pension planner often recommends combinations such as a group annuity or uninsured trust covering all employees, supplemented by an individual policy plan on the employees receiving over $3000 a year, *et cetera*.

no one charged with the direct responsibility of its legal representation, other than its own attorney. Tax counsel may be and certainly should be, consulted as to the requirements for securing tax deductions. A pension planner may be, and should be, called in to design the type of plan to be adopted.[6] But the tax

[6]In addition to deciding the question as to what type of plan should be adopted, discussed in footnote 5 above, many technical phases of the plan must be explored thoroughly by the employer with guidance by the pension planner. Each individual company has its own problems and its own policies. The good plan must be tailor made to fit. Innumerable variations are possible and should be considered in such things as the following: If a pension plan, should a "money purchase" formula be used under which a percentage of each employee's compensation is contributed annually to buy whatever benefits it will pay for, or should a "fixed benefit" formula be used, providing retirement benefits of a flat percentage, such as 30%, of the employee's average annual compensation, or a percentage per year of such compensation for each year of service with the company? If a profit-sharing plan, how definite must the formula be, having in mind Treasury Decision 3661? The maximum contribution cannot exceed 15% of affected employees' compensation—where should the minimum be? Should and can the amount to be contributed be left in the discretion of the board of directors? How soon and on what basis should the value of the contributions vest in the individual employees so as to be available to them on termination of employment prior to retirement? Some plans provide for no vesting until retirement, others have immediate vesting, most use a graduated scale depending either on years of service or years of participation under the plan or a combination of the two. What should be done about employees in military service, on leave of absence, temporary lay-off, re-employment, disability, earlier or later retirement, *et cetera*. What employees should be included in the plan? Up to five years of service may be required for eligibility. Where turnover is high some waiting period is advisable since it eliminates short term employees. Exclusions can be made on the basis of method of pay, amount of pay, type of work, minimum and/or maximum age *et cetera*, so long as the formula does not result in discrimination in favor of the so-called "unmentionables"—persons who are officers, stockholders, supervisory or highly paid. (Treasury Decision 3674 limits the amount which can be contributed for the benefit of certain shareholders to 30%

expert's chief function is the checking of the tax aspect of the plan and the pension planner must be an insurance man or an actuary thoroughly familiar with pension work and would generally have neither the legal experience nor the company's factual background to enable him to replace its counsel. In addition, no one directly connected with the company is as well qualified to weigh and study the proposals and suggestions made by the experts as is its own attorney. For this reason, trust companies and pension planners generally insist that the employer's legal counsel be brought into a case at the first conference.

After the decisions are made as to whether or not a plan is to be adopted and, if so, as to what type of plan it should be, the actual drafting of the instruments must be done by an attorney. Here again the company's own counsel is the person upon whom the company must principally rely. I should like to point out just a few of the strictly legal matters which must be considered in connection with the drafting of the instruments.[7]

Probably the first decision to make is whether the plan and trust should be set forth in two instruments or one. From the standpoint of the trustee, its job is somewhat simplified if it enters into a fairly standardized type of trust agreement with the company, the entire details of the plan being contained in a separate document to which the trustee is not a party. The plan then can be amended and changed from time to time without the necessity of changing the trust agreement. On the other hand, there are many definite advantages to having the entire plan and trust in one agreement executed by the company and the trustee. This imposes on the trustee the duty of seeing that action taken by it is authorized by the plan as well as the trust. It can never use as a defense the arguments that it is not a party to the plan, or that if the plan and trust are in conflict,

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of the total contribution). What should compensation include—bonuses, overtime, payments under a wage-incentive plan, commissions, *et cetera*? Great care must be taken in defining compensation to fit the facts and desires of the employer (and the Pension Trust Group). How should benefits be paid at death, retirement, severance, disability, *et cetera*? If optional methods of payment are available, in whom can and should the choice be?

[7]The following discussion assumes the adoption of a plan using a trustee. If a group annuity is used, the employer makes a direct contract with the insurance company.

the trust controls. This additional responsibility is a protection to the company, to the employees, and particularly to the members of the advisory or pension committee.[8] The members of these committees are not so likely to be as conscious of legal pitfalls and technicalities as are the attorneys for the trustee. If the trustee is bound by the terms of the plan and the trust, it will be compelled for its own protection to see that actions taken by the committee are within the purview of the plan and the law.

Another legal question is presented by the problem as to who should be parties to the plan and/or trust. Some of the earlier plans made the participating employees actual parties to the instruments creating the plan and trust. While this may be some protection to the employer by way of estoppel to claims of participants contrary to the terms of the plan, it would seem that the disadvantages of having to get the participants' approval to amendments or changes would influence most draftsmen to eliminate them as parties. The employer can and should be protected from such claims by having each participant sign a statement, often called an application, by the terms of which he acknowledges that he has received a summary of the plan, that he understands that the originals are on file with the trustee, the committee, and/or the company and are open to his inspection, that the company is making the entire contribution to the plan (or such part as it is making), that the company reserves the right to terminate or amend the plan at any time, that becoming a participant does not guarantee his continued employment, *et cetera*. In this same application the participant generally names the beneficiary or beneficiaries who will receive his death benefits, if available under the plan. The execution of such an application by a participant protects the employer, in the event of termination of the plan, against any claim by an employee that he was hired on the representation that he could retire with certain benefits and that, therefore, the employer has a contractual obligation to continue the plan in force or to pay him the promised retirement benefits.

Company counsel should also see to it that the documents are

[8]Where a corporate trustee is used, a pension or advisory committee is generally charged with the responsibility of administering the plan on behalf of the company. The members usually are, but need not be, employees of the company and serve at the pleasure of the board of directors.

in such shape that if a participant names a person other than his wife as beneficiary, the wife's consent is secured, or that if no beneficiary is named by the applicant, the death benefits will go to the persons entitled thereto, or if a request for a change of beneficiary is made by an applicant and he dies before the request is granted, that the instruments specify whether the old or new beneficiary will take. Every pension or profit-sharing trust in which a corporate trustee is named has exculpatory clauses protecting the trustee from liability as far as possible and every trust funded by the purchase of insurance contracts or annuities has an exculpatory clause protecting the insurance company. But here again, the members of the pension committee, who are going to have to make most of the decisions, who are most vulnerable to attack, and who often may act without the benefit of legal advice, are sometimes not protected by the terms of the trust instrument. The Commissioner of Internal Revenue has refused to approve plans with provisions to the effect that

a decision may be in the "sole discretion" of the committee. In fact, the word "discretion" is anathema to the Pension Trust Group and should seldom, if ever, appear in a plan or trust.[9] This requirement makes it difficult to use language which will protect the members of the committee in the exercise of their duties under a plan. It would, therefore, seem advisable at least to provide for indemnification of the members of the committee by the company, in the event they suffer personal financial loss by reason of having served on the committee, in the absence, of course, of malfeasance.

Other purely legal matters involve the language to be used relative to the investment powers of the trustee, language to prevent the trust from violating the rule against perpetuities, or the rule against suspending the power of alienation contained in section 715 of the California Civil Code,[10] and restrictions on assignment by the participants of their rights under the plan—so-called "spendthrift clauses."[11] Skillful legal draftsmanship also

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[9]The same is true of the words "may" and "or otherwise," unless used negatively. The reason for this apparent dogmatism is that the Bureau is anxious to eliminate possible discrimination by the committee in favor of stockholders, officers, persons whose principal duties consist in supervising the work of others, or highly-compensated employees. It is rumored that one trust was sent back by the Pension Trust Group with instructions to change the word "may" to "must" in the provision that "Three of the five members of the committee may constitute a quorum for the transaction of business."

[10]There is a definite possibility that a pension or profit-sharing trust might violate the rule against perpetuities and the provisions of Cal. Civ. Code §715 unless it is limited by express language. It is arguable that a separate trust is created for each employee, which terminates on his death or retirement, *et cetera*. New York by legislation has exempted pension and profit-sharing trusts from its rules against perpetuity and restraints. California can and should do the same insofar as Cal. Civ. Code §715 is concerned. However, difficulties arise in connection with our rule against perpetuities because of the provision in our California Constitution that "No perpetuity shall be created."

[11]Nearly all pension and profit-sharing trusts, as well as insurance and annuity contracts issued under them, contain spendthrift clauses. The insertion of such clauses is advisable even though it may be argued that they are ineffective as against creditors and assignees, on the ground that the employees have given consideration for their benefits under the plan. This problem, as well as those concerning the jurisdiction of the Commissioner of Corporations (footnote 12), and whether or not contributions to a qualified plan constitute compensation under the Wage and Hour Law, turn in part on the question as to whether or not a contribution into a pension or profit-sharing trust is current compensation for services currently rendered. It is easier to say that it is in the case of profit-sharing trusts than in that of pension trusts. In the latter case, the contributions are made to

is required to make consistent the terms of the plan, trust, policies, summary of the plan, application by employees, notice to employees, and any other documents used in connection with the adoption and the putting into effect of the plan.

In addition to the legal aspects pertaining to the creation and adoption of the plan, much of the work of qualifying the plan with the various governmental agencies should be done by or under the direct supervision of company counsel. The creation of a profit-sharing trust, or a pension trust by the terms of which the trustee's investment powers are not limited to the purchase of contracts issued by an insurance company, even though non-contributory, requires a permit from the Commissioner of Corporations, according to recent rulings of the California Attorney General.[12] If a permit is to be secured, it should,

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afford retirement benefits, enabling the employer to satisfy certain employee relations problems which arise from retaining superannuated employees on the payroll. Employees receive these benefits only upon satisfying certain conditions. Except in the event of complete termination of the plan, an employee never receives his benefits so long as he remains an employee of the company.

[12]There is a sound basis for saying that a contributory plan in which a trustee administers funds contributed by the employees constitutes the issuance of securities, i. e., beneficial interests in an investment trust. However, it is difficult to see how a security is issued by the creation of a non-contributory pension plan and trust. The Attorney General's opinions proceed on the theory that the funds contributed by the employer immediately become the employees' funds, since the employer is divested of them. Therefore, the investment by the trustee of these funds belonging to the employees constitutes the issuance of securities. In fact, the opinions imply that there are two issuances: one by the employer by virtue of the contribution, and one by the trustee. This reasoning overlooks entirely the fact that the funds are not actually vested in any employees, as individuals. They receive nothing unless and until certain conditions have been satisfied, such as death, retirement, *et cetera*. The employees become potential beneficiaries under the plan automatically by reason of being employees of the company. They do not have to contribute or take any other affirmative action. To say that they must then be protected in their "investment" by compliance of the employer and trustee with the terms of the Corporate Securities Act seems rather absurd. Furthermore, no practical benefit is achieved by compliance with the Act. In order to qualify a plan with the Commissioner of Internal Revenue far more rigid requirements have to be met than could practicably be imposed by the Commissioner of Corporations. The disallowance of the tax deduction is also a much more powerful weapon than a criminal threat against an employer for voluntarily contributing funds into a trust for the benefit of its employees. Despite these facts, under the present rulings of the Attorney General it would seem advisable to secure permits for trusts which, in his opinions, require them. The two good reasons are the possibility of the trustee being surcharged if it pays out funds under a trust ultimately declared void as having been created in violation of the Blue Sky Law, and the possibility of an employee

of course, be obtained prior to the creation of the trust. The filing of an application for a permit is clearly legal work to be done by the company's own counsel. If the trust provides for contributions by the employees and is not limited to investment in contracts issued by an insurance company, registration with the Securities and Exchange Commission also may be necessary.[13]

After securing a permit from the Commissioner of Corporations and registering with the Securities and Exchange Com-

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attacking the validity of the trust. In this latter event, if the employee were successful, the parties would probably be put in *status quo* and the funds would revert to the employer, but the purpose of the plan would have been defeated. I have been told by responsible Treasury Department officials that there is little possibility of the Commissioner of Internal Revenue disallowing the deduction for tax purposes merely on the basis of an Attorney General's opinion. It is understood that a test case is about to be filed against the Commissioner of Corporations for declaratory relief as to whether or not he has jurisdiction over pension trusts. If necessary, legislation should be adopted to exempt employee benefit trusts from the Corporate Securities Act.

[13]Even though they are contributory with investment not limited to insurance contracts, most trusts will be excluded under one of the exemptions in the Securities Act, as limited to intrastate transactions,

mission, if necessary, the next step is the execution of the trust. Although it is possible to secure an opinion of the Commissioner of Internal Revenue as to whether a plan will qualify prior to it's adoption, the length of time required to secure the opinion generally impels the conclusion that the trust should be executed, submitted for qualification, and, if changes are required, amendments made.[14] It is impossible to foresee all the possible requirements since new policies and rulings are being made almost daily. Counsel for the company can aid materially in the preparation of the material for qualification. Explanations often will forestall objections to matters in the plan or trust which might in most cases be discriminatory or otherwise open to criticism, but which in the particular case are warranted by circumstances peculiar to the history or condition of the company. The same is true of securing approval by the State Franchise Tax Commissioner.[15]

Approval of the Salary Stabilization Unit and the War Labor Board, when required, should be sought simultaneously with submission to the Commissioner of Internal Revenue.[16]

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not involving a public offering, or not involving the issuance of over $100,000 a year. In order to fall into this last exemption, a "letter of notification" must be sent to the Securities and Exchange Commission twenty-four hours prior to the creation of the trust. Query: Does the $100,000 include the employer's as well as the employees' contribution?

[14]Under present law, in order to get a tax deduction for a tax year ending prior to December 31, 1943, or December 31, 1944, approval by the Commissioner must be secured prior to December 31, 1944. Due to the large number of plans which have been submitted for approval and the resulting delay in the issuance of approvals, this time again may be extended by Congress as to plans submitted prior to a certain time. However, it would seem advisable to submit plans for qualification as soon as possible, especially those adopted in 1943.

[15]The same material submitted to the Commissioner of Internal Revenue should be submitted to the state Franchise Tax Commissioner, since the requirements of the state law are patterned after the federal. As to all plans put into effect after September 1, 1943, amendments must be made by December 31, 1944, to satisfy the requirements of the state equivalents of sections 165(a) and 23(p) of the Internal Revenue Code, and to secure deductions for the years 1943 and 1944. Neither the state act nor the regulations thereunder provide for securing approval by the Franchise Tax Commissioner. It would therefore seem advisable first to secure approval by the Commissioner of Internal Revenue and then to submit to the state the qualification material and evidence that federal approval has been given.

[16]A pension plan approved by the Commissioner of Internal Revenue under section 165(a) does not need approval of the Salary Stabilization Unit or the War Labor Board. However, a profit-sharing trust which provides for distribution prior to death, retirement, disability or sickness must be approved. The requirements for approval are

Company counsel can be of assistance in preparing the material and holding conferences, if necessary.

From the foregoing discussion it should be evident that the working out and putting into effect of a sound, properly designed employee benefit plan requires the cooperation of several people. A competent pension planner, a good trust officer, and the company's tax counsel must all work in harmony with the executives of the company, the attorney for the company constituting the balance wheel of the entire operation. He is the one best able to weigh the recommendations of the experts, sift out conflicting interests, if any, anticipate and bring up for consideration possible problems and assist in the mechanical details. He is also the one who, charged with the legal representation of the company, must be most instrumental in the extremely important and complicated task of articulation and expression in words of the finished product.

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clearly set forth in a mimeograph issued by the Treasury Department, December 6, 1943, Coll. No. 5604.

WAGE STABILIZATION CODE. ITS PRACTICAL APPLICATION

WHAT you can, and cannot do about increasing wages is succinctly set forth in a pamphlet just issued by the National War Labor Board. Most lawyers have had occasion to instruct their clients on the intricacies of the Wage Stabilization Act of 1942, sometimes without a feeling of confidence as to the ultimate action on specific cases. The practical application of the Code now is made clear and specific enough to remove all doubt as to when you are permitted to grant increases without approval, as well as when you are prohibited from so doing, and by what Board.

Increases permissible without approval include:

(a) To equalize rates paid to women for work of the same quality and quantity done by men in the same plant. (Such adjustments must not furnish a basis for price increases);

(b) Increases by employers of 8 or less employees;

(c) Increases up to 40¢ an hour;

(d) Increases up to 50¢ an hour where required by State laws;

(e) Individual increases for length of service, merit, reclassification, promotion, etc., within limits defined in General Order No. 31. Such increases may not be a basis for asking price relief, nor for applying to National War Labor Board to eliminate intra-plant inequities.

(f) Ordinary bonuses or commissions, if the amount is not greater than last year, and if the computing method is not changed.

General wage increases "across the board," are prohibited, except where required to bring the average straight-time hourly earnings of a substantial group of employees up to a level of 15% above the level of Jan. 1, 1941.

Wage increases to correct substandards of living are permissible, *e.g.*, minimum hourly wage rates up to 40¢; also up to 50¢ an hour where required by state minimum wage laws. In the latter case, Regional Boards are authorized to approve voluntary applications by employers. If the employees have chosen a

bargaining agent, the agent must join in the application. If employees are demanding an increase the employer is unwilling to make, then the case becomes a dispute for the National War Labor Board to settle.

The National War Labor Board has no control in (a) wage adjustments resulting from the operation of the Fair Labor Standards Act, (b) the National Labor Relations Act, (c) the Walsh-Healy Act, or (d) the Davis-Bacon Act.

Adjustments of salaries over $5,000 a year, and wages or salaries less than $5,000 a year of supervisory or professional employees not represented by labor unions, are put under the Bureau of Internal Revenue.

Adjustments for employees subject to the Railway Labor Act, are under the authority of the National Railway Panel. Farm workers are excluded from the authority of the National War Labor Board, and put under the War Food Administration.

A copy of the pamphlet mentioned above may be obtained at the branch office of the National War Labor Board, 117 West Ninth Street, Los Angeles 15.

E. D. M.

THE EDITORS SOMETIMES WONDER

IT IS NOT what one would call *hard* work to edit the BULLETIN; but it does take many hours of our time each month to do it. We are not complaining, please understand, because we subscribe to that statement credited to Theodore Roosevelt to the effect that every man owes some of his time to his profession. We think we can say, without offending good taste, that our product is not bad. We try to print each month news about the activities of the association along with articles on subjects of current interest.

We are indebted for most of our good points to the willing co-operation of the persons who write the articles we print; and we deeply appreciate the excellent work done by our printer in checking us for errors and in making the mechanical part of our work so easy for us.

Now to get back to what we wonder about. We wonder what our readers think and say about the BULLETIN. The authors of

our articles tell us that they sometimes receive verbal and written comments on what they have contributed, and occasionally we receive letters from readers. But the response from readers is so limited that we really do not have much of an idea of how our efforts are received. We should like to know more. Do you want more news about the association? Do you want more articles on legal subjects? Do you think we should print more articles about the legal profession and about the practice of law?

We cannot promise to comply with every request; but we shall try. If we know more about what you think of our work, it will assist us in our efforts to make the BULLETIN better.

We want you to know, also, that we should like to have you submit manuscripts for publication. The BULLETIN is not ours; it is yours. We are merely charged with the responsibility of publishing it.

By way of recapitulation, we wonder what you think of our authors' works and of the BULLETIN; and we invite your comments and criticism. We wonder if you have written an article you think should be published; and if you have, please send it to us.

THE BAR BULLETIN COMMITTEE.

A REVIEW OF "INDICES TO PROBABILITY"*

By Lester Wm. Roth, of the Los Angeles Bar

WHEN I promised to review "Indices to Probability" by Judge William J. Palmer, I did so because of my interest in the controversy as to whether a presumption is evidence, as Judge Palmer contends and California cases hold, or whether it is a procedural device; and in the hope that a reading of the book (which I would have to do in order to review it and which I probably would not do in the ordinary course of events) would enable me to make up my own mind as to what sort of legal animal a presumption is, or perhaps ought to be.

It never occurred to me that I had never reviewed any sort of book, but I was not deterred by that fact any more than I would

*This article by Lester Wm. Roth well may be considered as being more than a review of Judge Palmer's new book. It also is another contribution to the literature on the subject of the presumption as evidence or as a procedural device. For another article on the same subject, in which the views expressed are contrary to those of Mr. Roth, see Hale, *Presumptions: Comment on Tot v. United States*, 19 BAR BULLETIN, 274 (April, 1944).—ED.

be deterred from accepting a specific legal job because I had never done one like it before. The uncomfortable and inevitable consequences of my "in stride" attitude didn't actually impinge upon my consciousness until after I had read the Judge's book. I then started to wonder what I was going to do with it and finally came to the conclusion that the least I could do was to look at the Code.

I then read a couple more books on how to review a book: "Book Reviewing," Gard, 801 G 217; and "How to Criticize Books," Jones, 801 J 77 (the numbers, in case you've forgotten, are library references). I learned among other things that, strictly speaking, a review is one thing and a criticism another. The authorities cited, together with an host (I hope you notice the an) of others quoted, all seem to agree that it's strictly *de rigueur* to criticize and review in one spasm even though the functions of each are technically separate.

I calculated, too, that, even though the assignment was merely to review, the profession would not refine such niceties (as the case law in this state in respect of presumptions demonstrates) and that I had better review in the broad sense which has grown to include report, criticism, and comment (see authorities *supra* and *infra*.)

L. A. Sloper, quoted by Gard *supra*, page 55), says:

> "A book review should give a clear impression of nature, style and content of the book—but not a summary.
>
> "It should give an estimate of the value of the book, based on a standard acquired through familiarity with the best books of similar kind.
>
> "It should do these things briefly, clearly and entertainingly; therefore it must be well organized.
>
> "It should be critical but not caustic; gentle but not soft."

Jones, my other authority, has appended to his book (page 181) an article on "Don'ts for Reviewers" by Susan Warren Wilbur, of which there are 12. Number 3 is in part: "Don't use adjectives. They are all threadbare, even 'seductive' and 'intriguing.' 'Interesting' is, of course, the worst of the lot."

Since the reader is now completely advised of the total of the authorities upon which I predicate my license to review, we may proceed fairly on the maxim *Caveat Reador* (my Latin was always bad; even my boy has recently given it up).

Judge Palmer's book is not seductive or intriguing. Don'ts to the contrary, it is intensely interesting and solid. Its style has clarity and charm. Finally, the book carries a wallop. My one prayer is that I may be able to crystallize and transmit its message and its scholarship to the point which will prod the reader's curiosity to read.

The fundamental conflict between two schools of thought, whether a rebuttable presumption is in itself evidence or whether it is a procedural device, is the inspiration for the book. The book and this discussion is accordingly confined to rebuttable or disputable presumptions.

In *Smellie v. Southern Pacific,* 212 Cal. 540, 549 (1931), it is asserted dogmatically, the ukase being fortified with a wealth of California authority, "That a presumption is evidence and may in certain cases outweigh positive evidence adduced against it, has long been the settled law of this state."

Traynor, J., in his dissent to *Speck v. Sarver,* 20 Cal. (2d) 585, 592 (1942), says:

> "Rebuttable presumptions are thus no more than procedural devices for the fair apportionment between litigants of the burden of going forward with the evidence."

Professors of law have argued for some time that:

> "The office of presumptions is not to be found in the field of proof, *i.e.,* they are as presumptions neither in whole nor in part evidentiary." (Dean Wm. G. Hale, Vol. 19, Los Angeles Bar Bulletin, page 275.)

The excerpts above outline the opposing views which Judge Palmer analyzes. The analysis is an exhaustive study not only of cases but of the sources and roots of presumptions and to my mind an irrefutable case is made for the proposition that a *presumption is evidence.*

To the casual reader who has had no court contact with the effect of the distinction, the importance of whether a presumption is evidence or is a procedural device may not be readily apparent. This practical importance is best illustrated by actual cases.

In *Koster v. Southern Pacific,* 207 Cal. 753 (1929), the court *in banc* reversed a judgment in favor of plaintiff based upon a verdict of the jury on the theory that an instruction to the jury "that a person takes ordinary care of his own concerns" (C. C. P. §1963, subd. 4) should not have been given in view of the direct

evidence offered by defendant on the facts. In that case the husband of plaintiff had been killed at a railroad crossing. There was no evidence by plaintiff as to whether the deceased had stopped, looked, and listened. Plaintiff relied on the presumption that the deceased had exercised ordinary care in his protection. The defendant submitted a wealth of physical evidence and the testimony of one eye-witness (the fireman of the locomotive), the effect of which was that if the deceased had exercised ordinary care, it would have been impossible for the deceased not to have seen or heard the train before coming upon the tracks and therefore the evidence before the jury based upon the presumption had been rebutted and that the presumption had no place in the case as evidence. The Supreme Court said:

> "The respondent relies largely upon an indulgence of the presumption that the jury was at liberty to infer ordinary care and diligence on the part of the decedent from all of the circumstances of the case—his character and habits and the natural instinct of self-preservation—to hold the verdict. *This can be done only in the absence of direct proof of the fact.* The circumstances of the case alone are sufficient to rebut the presumption invoked." (Italics ours; *supra*, page 755.)

The *Koster* case, without saying so, treated the presumption as a procedural device. If a presumption is evidence, as California cases undoubtedly hold, such evidence raises a conflict (as is squarely held in the *Smellie* case, *supra*) and the instruction of the trial court was properly given unless it could have been held in the *Koster* case *as a matter of law* because of the facts proved in that case, *not* that the presumption was *rebutted* as it apparently says, *but that it was inherently improbable for the presumption to exist.*

It may be that the court in the *Koster* case intended to say (although I do not agree that the facts in the *Koster* case warrant such a statement) but the court does not say so directly and instead makes the erroneous and ambiguous statement (so far as the statutory and case law in California and the logic of the law of presumptions is concerned) that the presumption may be considered as evidence ". . . only . . . in the absence of direct proof of the fact . . ." In the *Koster* case the only direct proof of the fact *was by defendant.* The effect of the quoted statement is to assert that a defendant in a case, irrespective of

perjured testimony or the honesty or probable inaccuracies of defense witnesses, may eliminate a presumption in favor of a plaintiff (and in the *Koster* case, as in many others, such a presumption is all the evidence plaintiff has) merely by putting in direct evidence to the contrary.

It may be possible to eliminate a presumption as evidence by demonstrating the inherent improbability of its application in favor of a benefitee who invokes it by evidence adduced by the other side, in exactly the same way as it is sometimes possible to demonstrate the fallacy or perjured background of any testimony written or oral. When such is the case (which is rare) the presumption falls in precisely the same way as any testimony and is disregarded—*as a matter of law.* Thus as pointed out in the *Smellie* case, page 552, plaintiff in a cited case relied on the presumption that a person absent for seven years may be presumed to be dead. Defendant produced the "dead person" alive and in the flesh. This doesn't mean that experience and public policy has not made out a good case for the assumption as a fact that one absent for seven years is dead; it only means that in the particular case and on the specific facts, the presumption can't be drawn—because it happens to be inherently improbable as a matter of law that a person standing in the room is dead (even though we've all seen it).

In the *Smellie* case, *supra,* the doctrine of the *Koster* case is completely ignored. The *Koster* case is referred to in the majority opinion but in connection with another point and is relied upon only in the dissent. The court *in banc* in the *Smellie* case holds that a presumption is evidence. In the *Smellie* case as in the *Koster* case the presumption as evidence was all the plaintiff had. The trial court in the *Smellie* case, apparently in reliance on the *Koster* case, ordered a directed verdict for the defendant. If a presumption is not *evidence* the trial court was right and the *Koster* case was properly decided. The supreme court in the *Smellie* case reoriented itself and after a hearing and a couple of rehearings reversed the trial court and held properly in my opinion that a presumption is evidence.

Judge Palmer, in his book, correctly, in my opinion, demonstrates that prior to the *Koster* case there was little if any doubt under the laws and decisions of California that a presumption is evidence.

The shadow cast by the *Koster* case has, however, lengthened and deepened considerably. (*Paulsen v. McDuffie*, 4 Cal. (2d) 111 (1935), and *Speck v. Sarver*, 20 Cal. (2d) 585 (1942).) The dissent in the *Speck* case clearly and aggressively urges the abandonment of the doctrine that a presumption is evidence and asserts that it is nothing more than a procedural device. The chief justice, in a separate opinion concurring with a majority of the court in the *Speck* case, indicates that the dissenting justice has the right of it, but asserts that he concurs with the majority (adhering to the California view that a presumption is evidence) because, although the doctrine is erroneous, it has been established to be the law in California by the statutes and the cases.

Judge Palmer says in his book "there can be an anarchy of the law as well as an anarchy without the law." The statement is rapidly becoming applicable to the law of presumptions in California. The school of thought represented by the dissent in the *Speck* case is, in my opinion, a theory exploded by the painstaking study and the logic of "Indices to Probability." The book makes a thorough analysis of a wealth of background material out of which presumptions are born and traces the growing up of the doctrine that presumptions are evidence from the sources and roots underlying the doctrine.

No lawyer or judge can doubt (as the book points out) that a proper inference is evidence. Our Code says so. (C. C. P. §1957.) Most reasoning implicitly employs and adopts multiple inferences because in most cases (not alone those in court) complete direct facts are not always available for submission, frequently they are impossible to prove or submit, and just as frequently the person engaged in the reasoning process stops short of getting all the minutiae because of a feeling that it is unnecessary to do so. Reasonable and logical inferences are properly drawn from the submitted admitted, or contradicted evidence to make up the whole of the case required for that degree of conviction which will spur an individual to action, whether it be the delivery of a decision in an ordinary business transaction or of a judgment in a lawsuit.

The author points out that a presumption is nothing but a glorified inference. It is an inference lifted to the dignity of a presumption because over a period of time human experience has demonstrated certain facts with almost mathematical certainty,

to-wit, "that a person takes ordinary care of his own concerns"; "that evidence wilfully suppressed would be adverse if produced"; "that money paid by one to another was due to the latter"; "that the ordinary course of business has been followed"; "that a letter duly directed and mailed was received in the regular course of the mail." (Subs. 4, 5, 7, 20 and 24, C. C. P. §1963.) From the facts established by human experience the law in effect says that in a specific case you may infer, and until contradicted you must infer, that John Doe exercised ordinary care, etc.

The foregoing disputable presumptions have been selected at random. To illustrate the message of "Indices to Probability," let us analyze the last presumption quoted as applied to specific facts. Let us assume that in the trial of a case the pivotal question is whether or not a telegram was actually received by the addressee. (The presumption in question applies to telegrams as well as to letters. *Eppinger v. Scott,* 112 Cal. 369 (1896).)

Plaintiff, who has the burden, proves that he dictated the telegram; that it was properly addressed; that he personally delivered it to a Western Union office at an exact time and paid for its transmission; that at the time of delivery to the Western Union office he gave specific instructions to a man who was sitting at a ticker, and who had stated he was general manager of the office, to send the telegram forthwith; that the man took his money and said he would send the wire; and that plaintiff then left the office. (This is even more than plaintiff would have to prove under the cases.) Plaintiff thereupon rests. If there is no further evidence, no one can doubt that any court would be impelled to find that the telegram was actually received within proper time by the addressee. Such a finding of receipt is a logical inference, which because of human experience (and perhaps dictates of expediency) has been raised to the dignity of a presumption which the law directs *must* be found *unless* contradicted. If the law did not dictate the above presumption a trial court in its discretion might or might not make the inference of actual delivery. In the absence of a presumption, which *must* be drawn from the facts stated, the court might find that the plaintiff did not meet his burden and had fallen short of the proof that the telegram was actually delivered.

To illustrate further, when plaintiff finished the proof as outlined, defendant, instead of ignoring it, takes the stand and

testifies that he was out of town on the day the telegram would ordinarily have been delivered and that he did not receive it. Such testimony on the part of defendant is direct proof of the fact of non-delivery. Under the doctrine of the *Koster* case and of the dissent in the *Speck* case the presumption would disappear as evidence as it would be a mere procedural device which gave to plaintiff a mere procedural advantage. Direct evidence to the contrary by defendant eliminated this advantage. If plaintiff, after defendant has so testified, desires to have any evidence in the case on the subject of delivery, he must be prepared to meet defendant's denial by other evidence and if he does not have such other evidence he has no evidence on the subject of delivery at all.

Such a conclusion, in my opinion, is untenable. The defendant might have been lying. The defendant might have been honest but mistaken as to the day he was out of town. The defendant might have been leaving his home or office in a hurry with his mind on other things and might have met the Western Union boy (a sort of a fictitious person these days) in the hall of his building or at his front door, taken the wire, placed it in his pocket, and run for an elevator or street car, forgetting all about it and actually having it in his suit while he is on the witness stand testifying he never got it. (It could happen with some people, even lawyers or judges.) Under such circumstances the court under the procedural device rule would be compelled to throw out the presumption because of defendant's direct evidence of non-delivery.

If a presumption is evidence, however, and not a rule of procedure, the judge is required to do nothing of the kind. The presumption being evidence must be considered and weighed against the direct testimony; and the judge, depending upon whether or not he believes the witness to be truthful, alert, and in the full possession of his faculties (a witness is evidence) or a complete liar or an honest man, albeit absent-minded and of slovenly habits, will decide whether or not the direct evidence should be believed as against the presumption. Once the trial judge decides, however, the finding made is one made on *conflicting evidence* and such finding cannot be disturbed by a reviewing court.

To illustrate further, when plaintiff has rested, defendant

testifies he did not receive the telegram and then proceeds to further prove by a witness who was in the telegraph office at the same time plaintiff was there that the moment plaintiff left the office, and before the general manager had an opportunity to sit down to the ticker, the general manager was seized with a heart attack and died and was taken away in a hearse, and further, while the body was being removed a fire broke out and the Western Union office was destroyed. On the assumption of these further facts the disputable presumption of actual delivery to the addressee merely because the telegram was properly deposited is still evidence, although it becomes weak to the point of being worthless, but it would still, in my opinion, not be so worthless that the court could say as a matter of law that delivery under such circumstances was inherently improbable. If, on the other hand, the plaintiff himself or one of plaintiff's witnesses gave the same testimony and plaintiff attempted to rely on the presumption because he had actually deposited the telegram for delivery with a proper source (for no reason except that he is entitled to it as a matter of law) the court could say *as a matter of law* that on the facts admitted by plaintiff it is inherently improbable that the wire was ever delivered and throw the presumption out of the case.

This would be so, not because a presumption is not evidence, but because the other evidence adduced by plaintiff and by which he is bound destroyed the presumption. In short, the fact (deposit in a telegraph office) from which to make an inference or presumption still exists but proof has demonstrated that the inference or presumption just can't be considered.

If there were no law of presumptions, and if upon the basis of the hypothetical facts last set forth a trial court attempted to *infer* from plaintiff's proof that the telegram was actually delivered to the addressee, any finding based upon such an inference could properly be vacated by a reviewing court on the theory that the usual inference was completely destroyed by plaintiff's own testimony and that such an inference is inherently improbable as a matter of law. The court can say the same thing about a presumption.

It is idle to talk of presumptions being procedural devices which shift the burden of persuasion or the burden of going forward; all evidence produced by one side or the other shifts the

burden of persuasion or the burden of going forward. Plaintiff in a suit on a promissory note as part of his burden of proof must prove nonpayment. Proof of that fact is direct evidence, as distinguished from a presumption, but the direct evidence of nonpayment is also a procedural device in the sense that it is contended a presumption is, because immediately upon proof of nonpayment the burden of persuasion or the burden of going forward shifts to the other side. The other side, excluding for purposes of this illustration other defenses, must submit evidence of payment or give up the ghost. If the defendant testifies he did pay the court is in a quandary. It must resolve a conflict; but whichever way it is resolved the finding is binding upon a reviewing court.

It is conceivable that at some time in the future the legislature might add to the Code a disputable presumption to the effect a promissory note shall be presumed to be unpaid unless it is in the possession of the payee marked "cancelled and paid." The case of *Sarraille v. Coleman*, 142 Cal. 651, 653 (1904), apparently assumes that there is such a presumption (in my opinion it is still but an inference) and holds: "The possession of the notes raises the presumption of nonpayment and appellant admits that the burden is upon him to prove payment." At present the Code seems to put the presumption the other way: "That an obligation delivered up to the debtor has been paid." (C. C. P. §1963, subd. 4.) If the suggested presumption is ever enacted by the legislature it will be done presumably because over a period of many, many years human experience has shown that a promissory note in the payee's possession which has not been marked "cancelled and paid" has not been paid. Assuming the enactment of such a presumption as law, the holder of a promissory note in a suit upon the same would merely introduce it in evidence and rest. It would be precisely as if he had taken the witness stand and testified that the note was unpaid. In the assumed case, after the introduction of the note, suppose the debtor takes the stand and testifies that he paid the note, but that he omitted to have it returned to him marked "cancelled and paid." Assuming in both cases the testimony to be as bare as that outlined, is there any reason why there should not be a conflict in the second case as well as the first? On the basis of what I believe is an inference the court in the

Sarraille case, *supra*, has already decided there is such a conflict.

There is little danger that any legislature will run amuck in enacting disputable presumptions promiscuously. Under well-settled law a presumption cannot be legislated merely at the whim or caprice of the legislature. There must be a well grounded reason for it. The test of such legislation is stated by Mr. Justice Roberts in a recent case (1943) as follows:

> "Under our decisions, a statutory presumption cannot be sustained if there be no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from the proof of the other is arbitrary because of lack of connection between the two in common experience." (*Tot v. United States*, 63 Sup. Ct. 1241, 87 L. Ed. (Adv. Ops.) 1119 (1943).)

Mr. Justice Roberts makes the point which Judge Palmer emphasizes in his book, *i.e.*, that when common experience has demonstrated that a certain logical inference may be invariably drawn from a proved fact, the legislature may raise such logical inference to the dignity of a presumption. If the legislature

attempts to create a presumption where there is no logical basis for one, such a presumption is unconstitutional. (*Tot* case, *supra.*)

It is recognized by Judge Palmer that there are presumptions that have acquired, and may in the future acquire, that dignity, not so much because they have proved to be logical inferences over a long period of human experience, but because of public and constitutional policy. The presumption that a person accused of crime is presumed to be innocent (although that is not the exact wording of the presumption as set forth in subd. 1, C. C. P. §1963) might well be presumption of this type. If it be conceded that the public and constitutional policy behind such a presumption is healthy, why should not the presumption itself become evidence as a matter of public and constitutional policy. The body of our law certainly does not lack indulgence in fictions which have been and are used, not just as procedural devices, but for the purpose of fixing substantive rights. Confessedly, if there is a presumption of innocence that presumption is in itself a procedural device which places the burden of guilt on the state, but under our rules of procedure and wholly irrespective of the presumption, the burden of proof as well as the burden of going forward would be on the state anyway. The presumption of innocence, however, is more. The accused in a criminal case may stand mute and, the statement in the dissent in the *Speck* case (p. 597) that a presumption of innocence is not evidence to the contrary notwithstanding, the fact of the matter is that the presumption of innocence is evidence and the jury is in effect told so by every judge who ever instructs a jury to the effect that "an accused is presumed to be innocent until proved guilty beyond a reasonable doubt." Three or more eye-witnesses to a murder might testify to all the elements that make up a 100% case for the prosecution and the accused might rest without a shred of defensive evidence, but if the court failed to give such an instruction it would be reversible error. Further, the Supreme Court of the United States has specifically held that the presumption of innocence is evidence. (*Coffin v. United States,* 156 U. S. 432, 15 Sup. Ct. 394, 39 L. Ed. 481 (1895).)

As previously explained, there are cases in which a presumption can be eliminated from a case; but this is so, not

because a presumption is not evidence, but because in those cases where it may be eliminated, incontrovertible evidence amounting to demonstration has made the presumption in the particular case inherently improbable as a matter of law (*Smellie* case, *supra,* p. 552) or the benefitee of the presumption has elected to submit facts to the court in lieu of the presumption, thereby either destroying it or waiving it. (*Mar Shee v. Maryland etc.,* 190 Cal. 1 (1922).) To illustrate, in the *Koster* case if the *plaintiff* had placed a witness on the stand from whom evidence was developed on direct or cross-examination to the effect that he was sitting in the automobile which was being driven by the deceased and that the deceased was drunk and did not stop, look and listen, the presumption which the law directs or the inference which might be usually drawn (in the absence of such specific evidence) from the generally accepted fact that people as a rule exercise care to avoid personal injury, is completely destroyed. It is not unusual in a personal injury case for a plaintiff to admit that he was negligent in some respect and contend that the other fellow had the last clear chance.

This, however, is an altogether different doctrine from that enunciated by the *Koster* case and the dissent in the *Speck* case. If the *defendant* in the *Koster* case produced an eye-witness who testified to the same effect, to-wit, that he was sitting in the car with the deceased and that the deceased was drunk and neither stopped, looked nor listened, that would be direct testimony of the fact, but it would not destroy the presumption because the plaintiff on such a hypothesis is not bound by the defendant's testimony and may controvert it by other testimony or by a presumption. The distinction is that plaintiff is bound by his own testimony; he is not bound by that of defendant no matter how convincing it may seem, unless the showing be of incontrovertible physical facts or natural laws and their consequences. Plaintiff vouches for the veracity of his own witness and as a rule elects to be bound by the testimony of his witness when he places the witness on the stand. The reasons for the distinction are obvious. The defendant's witnesses may be untruthful; they may be honest but inaccurate; they may be dishonest; they may be subject to bias and prejudice.

In this connection, it is interesting to note it has been held in this state that if a defendant is called by a plaintiff under

C. C. P. §2055 evidence on the direct fact given by defendant so called is not binding upon the plaintiff and is not the type of direct evidence which is sufficient to take the presumption as evidence out of the case. "'Our conclusion, therefore, is that the testimony of a witness called under section 2055 of the Code of Civil Procedure is not, when weighing it against a presumption, to be considered, nor is it really, evidence of the party calling such witness, and that the evidence thus produced does not dispel a presumption contrary thereto, but in favor of the party calling such adverse witness. This testimony is, of course, evidence in the case and may be considered in determining the issues of the case upon the trial or final hearing by the court, or if the case is before a jury, by the jury. When the action is before a jury, however, the duty of weighing this evidence is with the jury and not with the court upon a motion for nonsuit or directed verdict.'" (*Smellie v. Southern Pacific Co., supra,* p. 559.)

I have not attempted to analyze each presumption set out in C. C. P. §1963 to discover whether one or more of them are in fact nothing but procedural devices, but after reading Judge Palmer's book and subjecting its assertions and conclusions to such critical analysis as my experience and mental capacity permit, I am thoroughly convinced that a presumption is evidence and that if any of those listed in C. C. P. §1963 do not analyze out that way, then they are not presumptions in the historical, legal, and common sense acceptance of that term. If any one of the presumptions listed in C. C. P. §1963 is no more than a rule of procedure, it belongs in a different section of the code, and should have a different name.

There are other phases of law of presumptions which receive excellent treatment in Judge Palmer's book, but this review is already too long. I have however attempted to transmit the primary message of the book and I trust that the effort has not been too involved or verbose. For better reading, clearer statement, and complete analysis I recommend the book.

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